

# MEMORANDUM

October 27, 2000

To: The Commission

From: Commissioner David M. Mason

Re: MURs 4929 (NBC, CBS, *et al.*), 5006 (Hardball), 5090 (Harley Carnes, WCBS) and 5117 (New York Times)

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I propose that we activate and immediately dismiss MURs 4929, 5006, 5090 and 5117. The complaints underlying these MURs are meritless as the Respondents are unquestionably entitled to the media exemption. Consequently, no further OGC resources should be wasted on these MURs.

Each of these MURs are complaints specifically about the media entities' news stories, editorials or opinions.

The purpose of my proposal to dismiss these MURs immediately is to avoid having these matters sit on our docket and become stale or have OGC resources devoted to substantive dismissal. I believe that the nature of the media exemption, interpreted by the courts as requiring the Commission to avoid even investigating the media whenever possible, and the desirability of providing clear guidance on FECA whenever possible, argue in favor of expeditious dismissals of these matters. This memorandum would serve as the basis for a Statement of Reasons.

In MUR 4929, Complainant alleges that ABC, CBS, NBC, the New York Times, Los Angeles Times and Washington Post are de facto political committees and are making illegal corporate campaign contributions by virtue of their news and commentary masquerading as free advertising for the two major party presidential candidates. In MUR 5006, Complainant alleges that the television show "Hardball," hosted by Chris Matthews on CNBC, is a political committee or an affiliated committee with the Republican National Committee, George W. Bush's campaign committee and the exploratory Senate committee of Rudolph Giuliani. In addition, Hardball is accused of violating the FEC's "equal time" rulings and of the corporate contribution ban. Finally, the complaint charges Hardball and Chris Matthews with becoming a corporate electronic voter guide.

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In MUR 5090, the complainant alleges that Mr. Harley Carnes, a "regular CBS newscaster," attacked Vice President Gore, Hillary Clinton and President Clinton during "regular" or "typical" newscasts on WCBS radio 880. Complainant expresses concern that an "outside organization" may be responsible for Mr. Carnes' editorial statements on the Clintons and Gore or that CBS may be directing Mr. Carnes to "deliver these political attacks." In MUR 5117, the complainant alleges that the New York Times contributed corporate "public relations services" at the suggestion of the Republican National Committee by knowingly or recklessly publishing false statements in several news, editorial or opinion stories questioning Vice President Gore's honesty or veracity. The complainant alleges that the Times failed to exercise its "normal editorial function" in publishing these stories.

Complainants' misplaced references in MUR 4929 to the FEC's "equal time" rulings (an apparent reference to Federal Communications Commission regulations) and in MUR 5090 to "pertinent FCC Regulations" should be dismissed because we have no jurisdiction over violations of these regulations. The remaining allegations against all respondents mentioned in these complaints should be dismissed because they are obviously protected by the media exemption in 2 USC § 431(9)(B) and committee regulations at 11 CFR 100.7(b)(2) and -.8(b)(2).

The FECA excludes from the definition of "expenditure" "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i); *see also* 11 CFR 100.7(b)(2) and -.8(b)(2) (terms "contribution" and "expenditure," respectively, do not include "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate . . .").

When considering complaints against media entities, courts have insisted that the Commission restrict its initial inquiry to whether the media exemption applies. *Readers Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1214-1215 (S.D. N.Y. 1981); *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1312-13 (D. D.C. 1981). Only after concluding that the media exemption does not apply may the Commission commence an inquiry under its otherwise applicable "in connection with" or "purpose of influencing" standards.

This two-stage process was mandated because the media exemption represents a fundamental limitation on the jurisdiction of this agency, and even an investigation of publishers can trespass on the First Amendment. As the *Reader's Digest* court expressed it: freedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation. Those concerns are particularly acute where a governmental entity is investigating the press in connection with the dissemination of political matter. These factors support the interpretation of the statutory exemption as barring even investigation of press activities which fall within the exemption. [509 F. Supp. at 1214.]

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In construing the scope of the "broadcasting station[s], newspaper[s], magazine[s], or other periodical publication[s]" shielded by the media exemption, the courts have held two questions to be relevant: whether the entity is owned or operated by a political party, candidate or political committee, and whether the entity is operating within its "legitimate press function." *Id.*; see also *Phillips Publishing*, 517 F. Supp. at 1313.

There is no doubt that none of the media Respondents is owned or controlled by any candidate, political party or political committee.

The complaints cite directly and only the news stories and commentary of the respondent entities, leading to a per se conclusion that the activities complained of fall within the statutory exemption of any "news story, editorial or commentary" and within the judicially-described "legitimate press function." The content of any news story, commentary or editorial is irrelevant to the determination of whether the media entity is exercising its valid press function.

This straightforward reading of the media exemption is consistent with our unanimous treatment of it in MUR 4863. There, the complainant alleged that a radio talk show host "*expressly or implicitly advocated* the reelection of Senator D'Amato and/or the defeat of Representative Schumer. He may have also replayed portions of D'Amato advertisements and commented on them." First General Counsel's Report at 8-9. Nonetheless, we concluded that the "commentary apparently broadcast on the [radio talk show] would appear to be squarely within the 'legitimate press function' of [the radio station]." *Id.* at 9. Moreover, our conclusion was "not altered by the possibility that D'Amato advertisements may have been rebroadcast . . . within the context of [the talk show host's] commentary on them." *Id.* (citing AO 1996-48). This analysis is also consonant with MUR 3624, in which we determined that a radio station exercised its press function where it was alleged to have effectively broadcast unpaid advertising for Bush/Quayle via airing of the Rush Limbaugh program, which had endorsed Bush/Quayle. See also MURs 4946 (CBS News) and 4689 (Dornan).

Thus, in these MURs, the allegations that the various news stories, commentaries or editorials may be biased in favor of various candidates -- even if assumed to be true -- are simply insufficient to provide reason to believe that any violation of the FECA has occurred. These allegations of unbalanced news reporting and commentary are precisely the activities protected by the media exemption.

The allegation in MUR 5090 that an "outside organization" may be responsible for the editorial attacks is belied by the complaint's assertion that the offensive statements were made during regular newscasts by a member of the regular team of newscasters. Nothing in the complaint even suggests that the statements at issue were advertisements, and the assertion that "outside parties" may have been responsible is simply too vague to constitute a cognizable claim of a FECA violation or to provide any reason to believe that the broadcasts at issue were not within the station's legitimate press function.

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The allegation in MUR 5117 that the New York Times may have been influenced in its news, opinion or editorial coverage by suggestions from the Republican National Committee does not provide any reason to believe that the stories complained of were not within the Times' legitimate press function. Political parties and campaigns employ platoons of advisors, handlers and spokesmen charged with attempting to shape or influence media coverage of campaigns. Businesses, labor unions, interest groups and government agencies likewise attempt to influence press coverage of topics in which they are interested. It is clearly a part of the normal press function to attend to the competing claims of parties, campaigns and interest groups, and to choose which to feature, investigate or address in news, editorial and opinion coverage of political campaigns. The question of whether a news organization may have credulously or recklessly accepted and reported the claims of one political party or candidate is the type of inquiry which the courts have held to be foreclosed by the FECA's media exemption.

For these reasons, MURs 4929, 5006, 5090 and 5117 should be immediately activated and dismissed with no RTB findings.